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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DANNI HERNANDEZ,

Defendant and Appellant.

G042154

(Super. Ct. No. 08CF1870)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Glenda Sanders, Judge. Affirmed.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda Cartwright-Ladendorf and Christine Levingston Bergman, Deputy Attorneys General, for Plaintiff and Respondent.

Danni Hernandez appeals from a judgment after having been found guilty by a jury of domestic battery with corporal punishment in violation of Penal Code section 273.5, subdivision (a).¹ The jury also found that pursuant to section 12022.7, subdivision (e), Hernandez personally inflicted great bodily injury on the victim as described in section 13700. Hernandez contends the trial court erred by refusing to inquire into whether potential jurors were biased against illegal immigrants. We find no error and affirm the judgment.

FACTS

Migdalia Armenta was the victim of a vicious beating on the evening of April 12, 2008. On the night of the assault, she identified Hernandez as her assailant. She continued to maintain Hernandez was the person who injured her while at the hospital and in a follow-up interview with the police. Approximately six weeks after the incident, Armenta changed her story and said it was not Hernandez but a former boyfriend, Juan Sanchez, who had assaulted her.

There is no dispute Armenta was at a party at Hernandez's house on April 12, the night she was assaulted. She consumed a significant amount of alcohol at the party and was intoxicated by the end of the evening. During the evening, Armenta was severely beaten. She called her daughter and asked her to come pick her up. When Armenta's daughter arrived and saw her, she called an ambulance. When the ambulance arrived, Hernandez walked out of the house and Armenta's daughter identified him to police as the person who had hit her mother. Armenta stated, "No; you don't know, you don't know, hold on a minute." Hernandez ran to the side of the garage and remained out of sight.

Armenta was taken in the ambulance to the hospital where she was interviewed by Santa Ana Police Officer Jason Bruns. Armenta told Bruns she had been

¹ All further statutory references are to the Penal Code, unless otherwise indicated.

at a party at her boyfriend Hernandez's house and they were arguing all evening. When the party ended, she followed Hernandez into his bedroom, where he assaulted her. Armenta recounted in detail how Hernandez repeatedly punched and choked her. Armenta told Bruns that during the attack she feared Hernandez was going to kill her. Armenta pretended to be unconscious and escaped when Hernandez went to the bathroom. Once outside, she borrowed a telephone from a neighbor and hid until the police arrived. Armenta told Bruns she was afraid of Hernandez and he had threatened that if she tried to leave him, he would take it out on her kids. A crime scene investigator took photographs of Armenta's injuries.

On April 17, Adeline Hayes, a domestic violence investigator with the Santa Ana Police Department, went to Armenta's apartment and showed her a Department of Motor Vehicles photograph of Hernandez. Armenta identified Hernandez, without any hesitation, as the man who had assaulted her on April 12.

On May 29, when Hayes again contacted Armenta at her home, Armenta recanted her identification of Hernandez. Later at the police station, Armenta told Hayes it was Sanchez who hit her. Armenta explained she was at the party but left with Sanchez in his car. They began to argue, and he beat her up. Afterwards, Sanchez drove her back to Hernandez's house. Armenta went into Hernandez's bedroom and lay down on the bed. Later she got up, exited through the bedroom window, and got help from a neighbor. Armenta described Sanchez to Hayes as a former boyfriend who lived in Riverside, but she was unable to provide an address or a telephone number for him, and did not know his birth date.

At trial, Armenta testified Sanchez had assaulted her, not Hernandez. She denied arguing with Hernandez at the party. Armenta testified that while at the party, she received a telephone call from Sanchez, who wanted to talk to her. She gave him the address of the party. Later, Armenta walked outside and found Sanchez waiting for her in his truck. When she got in the truck, Sanchez was angry. As they began to drive

away, Sanchez started to beat her up. Armenta described being slammed into various parts of the interior of the car. After driving for about 20 minutes, Sanchez stopped the truck and they both moved into the backseat to talk. Armenta thought Sanchez had gotten over being angry, but then he grabbed and bit her. Armenta told Sanchez he had to take her home, but he took her back to Hernandez's house.

Armenta entered Hernandez's house through the back door and went to his bedroom. When Hernandez walked into the bedroom, he asked Armenta what had happened. Armenta explained she had left the party with a former boyfriend and he had beaten her up. Hernandez told her that she should go to the hospital and Armenta said she would go the next day. Hernandez then left the bedroom. Armenta was too embarrassed to leave Hernandez's house through the front door, so she went out through the window.

Armenta testified she earlier misidentified Hernandez as her assailant, so she could extort money from him. Armenta claimed she called Hernandez after she got out of the hospital and demanded he pay her \$50,000 (or give her his car) or she would tell the police he was the one who assaulted her. Hernandez refused and said if she accused him, he would defend himself. Armenta initially testified she did not remember talking to the police at the hospital, but later admitted she made statements to the police at the hospital. She identified photographs offered by the prosecution as those taken of her injuries at the hospital.

Defense Evidence

The defense presented a letter Armenta had written at defense counsel's request. Although there were minor inconsistencies, the letter revealed a version of events similar to Armenta's trial testimony.

Abraham Valenzuela testified that at the party he saw Armenta speaking on a cell phone, and then saw her leave the party and walk outside. He heard a car horn honk and saw a car arriving. Later, Valenzuela saw Armenta return to the house through a side door, and she went into the bedroom. He could not see her face before she entered

the bedroom. Valenzuela then saw Hernandez go into the bedroom and come out right away. He told Valenzuela “something is happening.”

Valenzuela testified he observed Armenta’s injuries when he was on the patio and noticed a disturbance. After seeing her bruises, Valenzuela hugged Armenta and asked her what happened. Armenta said her other boyfriend had beaten her up. Valenzuela went with Armenta to the hospital. On cross-examination, Valenzuela admitted that when interviewed by defense counsel a few months prior to trial, he did not mention giving Armenta a hug, nor did he say Armenta had told him that her other boyfriend had beaten her up. Valenzuela had known Hernandez for about 12 years, both were from El Salvador, and although they were friends, they did not see each other frequently.

Roque Amaya testified he had arrived at the party around 9:00 p.m. and was there until about 11:30 p.m. or midnight, but because he was drinking, he “wasn’t really paying attention to what time it was.” Amaya was drinking throughout the night. Amaya saw Armenta at the party, and recalled she was on her cell phone a lot. He remembered seeing a dark car, hearing the car horn honk three times, and seeing Armenta get in the car and leave. Amaya assumed the person driving the car was a man, but he could not actually see the person and could not tell if there was any one else in the car.

Amaya initially testified that when Armenta returned to Hernandez’s house, she had bruises on her face. Amaya later conceded he did not see Armenta’s face when she returned. Amaya was very drunk by that time, and he just saw her open the door and come in. Amaya testified it was Valenzuela who observed Armenta had been beaten up, and Amaya did not know who injured her.

During cross-examination, Amaya was asked about Hernandez hiding from the police. When he began to respond, “to tell you the truth we all got scared because you know . . .” the trial court interrupted. After counsel conferred at sidebar, cross-examination continued. When asked if he saw Hernandez at the house when police were

present, Amaya responded, “No, he -- he was scared because his documentation is not in order, and so he -- he -- he was trying to evade the police because, you know how it is when your paperwork is not in order, and in order to not face something which is worse, um, then I think that’s why he was evading the police.”

Francisco Salgado Bernal (Salgado) testified he too was at the party that night. He was outside on the patio drinking beer and could see Hernandez’s bedroom window from where he stood. He never saw anyone come out through the window. Salgado recalled seeing Armenta in the backyard during the party, then not seeing her for a period of time, but he did not see her leave the party. Salgado admitted being drunk. Although he never saw Armenta’s bruised face, he saw her by the window upset and crying.

Irma Ruiz rented a room from Hernandez. On the night of the party, she came home tired and went right to her room. Ruiz stayed in her room all night. She heard loud music from the party until almost midnight, did not see or hear any arguments during the evening, and never saw Armenta. Although Ruiz heard the police knock on her door after the music stopped, she did not answer the door and never spoke with the police.

Hernandez was convicted of domestic battery with corporal punishment in violation of section 273.5, subdivision (a), and the jury also found Hernandez personally inflicted great bodily injury on the victim pursuant to section 12022.7. The trial court sentenced Hernandez to three years on the domestic battery count, plus an additional five year term for the great bodily injury allegation, for a total sentence of eight years in prison.

DISCUSSION

Hernandez asserts the trial court violated his constitutional right to a fair trial by refusing to allow voir dire on the issue of illegal immigration. We find no error.

Prior to jury selection, defense counsel told the court he thought some of the witnesses were in the country illegally, and he requested the court to ask prospective jurors if they were “adamant about not liking illegal aliens.” When the court asked why that information would be presented to the jury, defense counsel indicated he did not know that it would. The court expressed concern that raising the issue of illegal immigration had the potential of eliminating 50 percent of the prospective jurors. The court noted many undocumented immigrants had been before the court, both as defendants and witnesses, and the issue had never come up before. Defense counsel responded, “All right. Your Honor, I’ll -- I’ll rely on your expertise in that area. I just wanted to raise it to discuss it.”

The trial court then asked counsel if there was something factually about the case that would render this line of voir dire relevant; neither counsel offered anything additional. The court again commented it did not think the issue would come up before the jury, and defense counsel indicated if it did he would ask for some sort of jury instruction at that time. The court did not expressly question the prospective jurors as to any bias against illegal immigrants but asked if they harbored bias toward Hernandez because he was obviously of Hispanic origin.

After Amaya testified he believed Hernandez likely attempted to evade the police because he did not have his papers in order, the court spoke with counsel outside the presence of the jury. It was concerned the comment might cause the jury to view Hernandez in a negative light, given societal controversy regarding the issue of illegal immigration. Defense counsel advised the court he had made a tactical decision not to ask the court to strike the testimony and he did not want the court to instruct the jury on the issue. Accordingly, Amaya’s comment was not stricken. In closing, the prosecutor argued Hernandez’s flight indicated conscientiousness of guilt, but he also commented Hernandez may have run from police because “he didn’t have his papers.”

Hernandez argues that because there was potential for the issue to come out in front of the jury, the court should have questioned prospective jurors on the issue of illegal immigration during voir dire. He asserts because there was no voir dire on the issue, a substantial number of jurors likely were biased against undocumented immigrants. He also asserts any jury instruction following Amaya's testimony would have only called further attention to the issue. Hernandez argues the jury may well have concluded that undocumented witnesses were unworthy of belief and that Hernandez was likely more likely guilty because of his immigration status.

In criminal cases, the trial court is required to conduct the initial voir dire of prospective jurors. (Code Civ. Proc., § 223.) Upon completion of this preliminary examination, "counsel for each party shall have the right to examine, by oral and direct questioning, any or all of the prospective jurors. The court may, in the exercise of its discretion, limit the oral and direct questioning of prospective jurors by counsel. . . ." (Code Civ. Proc., § 223.) "The trial court has discretion to limit voir dire, and the court abuses that discretion, warranting reversal of a conviction on appeal, only when its decision falls outside the bounds of reason [citation] resulting in a 'miscarriage of justice.' [Citation.]" (*People v. Navarette* (2003) 30 Cal.4th 458, 486.)

Trial courts have a duty to ensure defendants in criminal jury trials receive a fair and impartial jury. (U.S. Const., 6th Amend.) Consistent with this duty judges must be willing to ask prospective jurors relevant questions that are substantially likely to reveal juror bias or prejudice, whether consciously or unconsciously held. (See *People v. Wells* (1983) 149 Cal.App.3d 721, 727.)

Here, the colloquy between the court and counsel suggests the court was willing to voir dire the prospective jurors on any bias they might have with respect to undocumented immigrants if the questions were relevant based on the evidence that would be presented at trial. When the court asked counsel if they had any questions for prospective jurors, defense counsel said that because some of the witnesses were possibly

in the country illegally, he wanted the court to ask about bias against illegal immigrants. When the court asked how information on immigration status would come before the jury, defense counsel candidly responded, “I don’t know that it would.” The court has no duty to voir dire as to bias based on facts not reasonably expected to come out during the trial.

Even though the court and counsel did not expect the issue of illegal immigration to come out during trial, defense counsel advised the court that if it somehow came out in the trial, he would ask for some sort of jury instruction at that time. The court advised counsel that if it “slipped out,” it would instruct the jury that it was irrelevant whether a witness is illegally in the country. When Amaya suggested Hernandez likely attempted to evade the police because his papers were not in order, the court immediately offered to instruct the jury to disregard the testimony, but defense counsel made the tactical decision to forego such an instruction.

Hernandez asserts the jury might have believed undocumented witnesses were unworthy of belief, which might have prejudiced him. The record reflects the only reference to undocumented status was Amaya’s speculation Hernandez ran from police due to his immigration status. Hernandez was not a witness. But this does not mean we turn a blind eye to Amaya’s statement regarding immigration status. The court voir dired the prospective jurors on issues of ethnic bias, and we conclude the court’s questions would likely have prompted a response regarding illegal immigration if a prospective juror was “adamant about not liking illegal aliens.” We also note defense counsel indicated he had made a strategic decision not to move to have the testimony stricken and the jury admonished. This is likely because the reference to Hernandez’s immigration status established a reason, other than consciousness of guilt, for Hernandez to have run from the police, and thus benefitted the defense.

Hernandez argues any instruction would only have exacerbated the problem. We disagree. “We presume that jurors understand and follow the court’s

instructions’ [citations]. . . .” (*People v. Hovarter* (2008) 44 Cal.4th 983, 1005.) Additionally, “The doctrine of invited error bars a defendant from challenging an instruction given by the trial court when the defendant has made a ‘conscious and deliberate tactical choice’ to ‘request’ the instruction.” (*People v. Lucero* (2000) 23 Cal.4th 692, 723.) The same is true when a defendant makes a conscious and deliberate choice to decline an instruction such as Hernandez did here.

Hernandez claims this was a “close case” and thus any error in failing to allow voir dire on immigration bias was prejudicial beyond a reasonable doubt. Although we disagree with his characterization, because we find no error, we need not discuss this contention. The trial court did not err by refusing to voir dire the jury on the issue of bias towards undocumented aliens.

DISPOSITION

The judgment is affirmed.

O’LEARY, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.